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DRAFT MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

Compilation of comments by Governments and international organizations

CONTENTS

	Page
INTRODUCTION	2
COMPILATION OF COMMENTS	3
A. States	
Poland	3
Singapore	4
United Kingdom of Great Britain and Northern Ireland	8
B. Intergovernmental international organizations	
Asian Development Bank	13
European Union	13
Food and Agriculture Organization of the United Nations (FAO)	14
International Labour Office (ILO)	14
International Maritime Organization (IMO)	15
Organization for Economic Co-operation and Development (OECD)	16
United Nations Economic Commission for Latin America and the Caribbean (ECLAC)	16
C. Non-governmental international organizations	
Banking Federation of the European Union	17

INTRODUCTION

1. The Commission, at its twenty-seventh session in 1994, requested the Working Group on Electronic Data Interchange to present to it at its twenty-eighth session in 1995 draft model statutory provisions on electronic data interchange. [1] The Working Group, at its twenty-eighth session (Vienna, 3-14 October 1994), approved a text of the draft Model Law on legal aspects of electronic data interchange (EDI) and related means of communication and presented it to the Commission for its consideration (A/CN.9/406, paras. 175-176).

2. The text of the draft Model Law as approved by the Working Group was sent to all Governments and to interested international organizations for comment. The comments received as of 15 February 1995 from 3 Governments, 7 intergovernmental international organizations and 1 non-governmental international organization are reproduced below.

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[1] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 200.

COMPILATION OF COMMENTS

A. States

POLAND

[Original: English]

General remarks

Poland supports the general idea of adopting a model regulation of the legal aspects of electronic data interchange. The provisions of the draft could be largely incorporated into Polish national law, in particular in the regulations concerning banking settlements, both internal and international involving the participation of the Polish banks. Such an incorporation could be accomplished within the framework of the law of contracts, through an appropriate construction of relevant contracts.

In a long-term perspective however, an introduction of some adjustments in the relevant legal provisions might be required, in particular with regard to:

- the possibility of making declaration of will with the use of computer without hand-written signature of a given person;

- the possibility of recognizing the computer printouts as a document.

Detailed remarks

1. Article 5. Writing (written form)

Support is given to the tendency expressed in this article to grant the electronic messages legal effectiveness equivalent to their paper-bound counterparts (documents).

Some reservations however raises the proposal contained in point 1 of the article 5 stating that "Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference". It seems that this is a too general formulation and as such may cause some difficulties with its practical implementation. Therefore an insertion of an additional provision might be considered, stipulating that the electronic messages sent in accordance with the digital identification procedure (digital signature) would have an evidential value equivalent to the written documents.

2. Article 6. Signature

A modification of the contents of this article might be considered, giving also in this case preference to the digital signature which seems to fulfil most properly traditional functions of hand-written signature (identification of the originator of the document and indication of the originator's approval of the

information contained therein). Such a modification would also allow other methods of substituting the traditional hand-written signature, if the contracting parties find it appropriate.

3. Article 12. Acknowledgment of receipt

The contents of this article might be supplemented with an additional point 6 stating that in case a message being sent contains digital signature, such an acknowledgment is redundant.

4. Renewed consideration should be given to a proposal of including within the framework of the draft Model Law a provision regarding the responsibility of the parties to contracts agreed upon under the EDI system in the formulation contained in article 15 of the previous draft of the Model Law.

SINGAPORE

[Original: English]

Title

The phrase "...LEGAL ASPECTS OF.." is too vague and adds nothing to the preceding phrase "..MODEL LAW..".

The phrase "..AND RELATED MEANS OF COMMUNICATION.." was adopted so that the model law could encompass various possible technologies or combinations of technologies. However, since there was a divergence of views at the 28th session as to the precise words to be used and the fact that the Working Group did not specifically focus on any particular related technology, perhaps this phrase should be deleted.

For the above reasons, we suggest changing the title to:

"DRAFT MODEL LAW ON ELECTRONIC DATA INTERCHANGE".

Article 1. Sphere of application

The phrase "This Law forms part of commercial law." is superfluous. The drafting style also does not follow that used in the first articles of other UNCITRAL texts. For example, article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration reads, "This Law applies to international commercial arbitration.." and article 1(1) of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes reads, "This Convention applies to an international bill of exchange..".

For the above reasons, we suggest amending article 1 as follows:

"This Law applies to commercial transactions where information in the form of a data message is used."

For similar reasons, we suggest amending the footnote to article 1 relating to the sphere of application (for States who wish to restrict such application) as follows:

"This Law applies to international commercial transactions where information in the form of a data message is used."

Article 2(a). Definition - "Data message"

The concluding phrase "including, but not limited to, electronic data interchange (EDI)... or telecopy;" is unnecessary and may even extend the scope of the model law beyond what was originally intended.

We also suggest the use of the word "retained" in place of "stored" so as to be consistent with article 9.

We therefore suggest the following definition:

"'Data message' means information generated, retained or communicated by electronic, optical or analogous means;"

Article 2(c). Definition - "Originator"

The generation or storage of data messages does not create legal problems. It is the sending of such messages which has given rise to legal uncertainties. Therefore, the purpose for defining this term should be confined to that of determining who the sender of a data message is (other than an intermediary) as opposed to who generated or stored the data message.

We therefore suggest the following definition:

"'Originator' of a data message means a person by whom, or on whose behalf, the data message purports to have been communicated, but it does not include a person acting as an intermediary with respect to that data message;"

Article 3. Interpretation

While the present formulation emphasizes the need to interpret so as to be able to apply the model law uniformly between different countries, it should also highlight the fact that the model law is intended to facilitate the use of EDI and analogous means of communication in commercial transactions.

For this reason, we suggest the following change:

"(1) In the interpretation of this Law, regard is to be had to its international source, the need to promote uniformity in its application and the observance of good faith, as well as its purpose to facilitate the use of electronic data interchange and analogous means of communication in commercial transactions."

Article 4. Legal recognition

Other than stating the principle that a data message is to be legally recognized, this provision does not serve any purpose because it does not preclude an objection to a data message on any other ground. It is felt that articles 6-9 are more than sufficient to give legal recognition to a data message.

We therefore recommend deleting article 4.

Article 6. Signature

In respect of article 6(1)(b), we suggest the insertion (immediately after paragraph (1)(b)) of the following considerations in determining the reliability of the method used to identify the originator:

"In determining whether that method is reliable, regard shall be had to the following:

(i) the relative bargaining positions of the originator and the addressee in their choice of the method of identification;

(ii) the importance and value of the information in the data message;

(iii) the availability of alternative methods of identification and the cost of implementation;

(iv) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and

(v) the state of science and technology at the time the method was agreed upon."

Article 7. Original

With regard to article 7(1)(a), we have the following comments:

(a) we fail to see the relevance for imposing this requirement that the information be displayed to the person to whom it is to be presented;

(b) the requirement ignores the reality that in many EDI systems, the processing of data messages is automated with little or no human intervention. This means that the data message may not be displayed to any person at all nor is there a need to do so; and

(c) the requirement to display information raises the question as to whether the raw information (usually in the form of unintelligible machine language) should be displayed or the processed and intelligible information in the form of the final data message be displayed. Such a data message in its processed form is never "original". A sample copy of an EDI EDIFACT data message which is made up of unintelligible alpha-numeric characters is enclosed to illustrate this point. *

As for article 7(1)(b), we feel that the concept of a "reliable assurance" is completely vague and

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* Note by the Secretariat: this sample copy is not reproduced in this document.

difficult to apply. What exactly is an "assurance" as compared to a "method" which is the term used in article 6 and what is the acceptable standard of reliability?

For these reasons, we propose that paragraph (1)(a) be deleted and article 7(1) be drafted as follows:

"Where a rule of law requires information to be presented in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if the integrity of the information between the time when it was first generated in its final form, as a data message or otherwise, and the time when it is received by the addressee is maintained."

In respect of article 7(2), we recommend substituting in paragraph (2)(a) the words "normal course of communication, storage and display; and" with the words "normal course of communication and storage." and deleting paragraph (2)(b). Article 7(2) in our proposed form would read:

"Where any question is raised as to whether paragraph (1) of this article is satisfied, the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication and storage."

Article 8. Admissibility and evidential value of data messages

We recommend the following changes:

(a) in the title, "value" be replaced with "weight";

(b) in article 8(1), "admission" be replaced with "admissibility";

(c) in article 8(1)(a), "grounds" be replaced with "sole ground";

(d) in article 8(1)(b), the words "in writing, signed or" be inserted after the word "not";

(e) in article 8(2), "presented" be deleted;

(f) in article 8(2), "stored" be replaced with "retained"; and

(g) in article 8(3), the words "in writing, signed or" be inserted after the words "on the grounds that it is not".

Article 10. Variation by agreement

We suggest replacing the word "storing" with the word "retaining" so as to be consistent with article 9.

Article 12. Acknowledgment of receipt

In article 12(5), it is desirable to state clearly what type of acknowledgment of receipt is being contemplated. This is because EDI systems are able to generate two types of acknowledgment messages - functional acknowledgment and system acknowledgment. The latter is system generated i.e. triggered the moment the addressee reads or down-loads the data message.

Article 13. Formation and validity of contracts

At the end of article 13(1), we suggest that the words "a data message was" be replaced with the words "one or more data messages were".

Article 14. Time and place of dispatch and receipt of data messages

The present formulation of this article does not provide for the situation where a data message is dispatched and enters an information system of the addressee's intermediary which information system was neither designated by nor belonging to the addressee.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

Article 2(c)

The effect of this definition as drafted is that, where a data message is communicated to an addressee, and stored by that addressee, the person who communicated the data message and the addressee will both be an "originator" of it. This is likely to cause confusion. For example, article 6 provides that any rule of law requiring a signature can be satisfied by using a reliable method to identify the originator.

It is important to recognize that messages may be stored without necessarily being communicated; but, whether or not the data message is communicated, the person designated as the "originator" should be the person who generated the data message, and no other person. To ensure that this is the case, the words "stored or communicated" should be replaced by *"whether to be stored or to be communicated"*.

This amendment would also greatly simplify the definition because the exclusion of intermediaries would be achieved without any need for the final words ("but it does not include a person acting as an intermediary with respect to that data message"). These words could therefore be deleted.

Article 2(d)

The intention is that this definition should cover only the person with whom the originator intends to communicate by transmitting the data message. At present, the definition could also catch persons to whom the originator intended the addressee to copy or pass on the message. Article 2(d) should therefore be amended to read:

> *"(d) "Addressee" of a data message means a person with whom the originator intends to communicate by transmitting the data message."*

This would also enable the reference to an "intermediary" to be deleted.

Article 2(e)

The definition, as it now appears, is too wide. It covers any person who acts as an agent in receiving, transmitting or storing a data message, and is not limited to professional intermediaries in the sense in which the term is normally understood. Furthermore, the term "intermediary" is not used in the substantive provisions of the Model Law. It appears only in the definitions in article 2(c) and (d). As indicated above, these references to an "intermediary" are better avoided. The inclusion of a definition is therefore both unnecessary and confusing. It should be deleted.

Article 2(f)

To define "information system" in terms of a "system" is circular. Moreover, the word "system" in English has a number of possible meanings (for example, methodology), and is too vague. The UK considers that "information system" should be defined as meaning:

"the equipment, software and operational control which permit information to be generated, communicated, received or stored in a data message".

Article 4

The principle of this provision is accepted, provided that it can be drafted satisfactorily. There are two points on the drafting.

Firstly, the intention is not to affect requirements for particular formalities. (These are dealt with by articles 5, 6 and 7). The provision as drafted, however, does not make it clear that requirements for particular formalities (such as writing, or an original or a deed) are not affected where the inevitable and automatic consequence of using a data message is that the requirement is not satisfied. In such cases it would be possible to say: "The information is in a data message; *therefore* the necessary requirement (e.g. for writing etc.) has not been satisfied". As drafted, article 4 could thus be read as striking down the requirement in question. Since that is not the intention, some clarification is needed.

Secondly, the provision says that information shall not be denied legal effectiveness etc. It is not information as such, however, which has legal effectiveness. Documents, records and transactions may have legal effectiveness. Information does not. There is no such thing as legally effective information; information is merely disembodied data. (For this reason, too, it is awkward to refer to information as being "in the form of a data message". Information as such has no form, although it may be "recorded in the form" or "communicated in the form" of a data message.)

To take account of these points, the UK would suggest redrafting the provision as follows:

"The use of a data message to record or communicate information shall not affect the legal consequences of the record or communication or of what is recorded or communicated, provided that no particular requirement applies which the use of a data message does not satisfy."

Article 5(1)

Where a transmission is only valid if it is in writing, the date that it is put into writing becomes important.

If the transaction is concluded orally, and is only subsequently recorded in a data message, or a series of data messages, it is essential that the requirement for writing is only satisfied as from the date that the relevant data message is generated. As drafted, article 5 would have the effect that in such a case a subsequent data message could satisfy the requirement retrospectively.

Article 5 merely states that "a data message satisfies that rule", i.e. any data message, regardless of when it was generated. This would include a subsequent data message, and the article would therefore have the effect that a subsequent data message satisfied the rule as from the date that the rule became applicable. Yet when an oral transaction is subsequently put into writing, the written document can only be relied on, as satisfying the requirement that the transaction must be in writing, as from the date that the written document is generated. The same principle should apply to data messages.

The UK therefore considers that, after the words "data message", there should be inserted:

"generated at the relevant time".

The reference to "the relevant time" here would mean the time in respect of which the rule is applicable. It is the significant time, the time at which it is significant to know whether the rule was satisfied for the purpose of determining any issue.

Article 11

Paragraph (2): The word "ascertained" should be replaced by *"took appropriate steps to ascertain"*. As drafted, the word "ascertained" implies that the addressee was able to establish as a fact that the data message was that of the originator. In those circumstances, the provision would be unnecessary. All that is intended is that the provision should apply where the addressee carried out the agreed procedure.

Paragraph (3): The words "Where paragraphs (1) and (2) do not apply" should be replaced by *"Where paragraph (1) has not been shown to apply"*. Alternatively, these opening words should be deleted.

Whilst it is true that paragraph (3) should not apply where it is known that the communication was authorised, neither should it apply where it is known that the communication was not authorised. As drafted, paragraph (3) applies (and only applies) where the data message was not communicated by the originator or by another person who had the authority to act on behalf of the originator. Instead, paragraph (3) should only apply where there is uncertainty as to whether paragraph (1) applies.

For this purpose, it is not necessary to refer to paragraph (2). All that is necessary is that there should be uncertainty as to whether paragraph (1) applies.

As regards the choice between the words in square brackets, the UK considers that the presumption should be rebuttable, and the word "presumed" should therefore be chosen.

Paragraph (3)(b): The word "ascertained" should be replaced by *"took appropriate steps to ascertain"*. As in paragraph (2), the word "ascertained" implies that the addressee established as a fact that the data message was that of the originator. All that is intended is that the addressee used a reasonable method of verifying.

Tailpiece to paragraph (3): The words "subparagraphs (a) and (b) do not apply" should be replaced by *"this paragraph does not apply."* The operative part of the paragraph which is disapplied is in the chapeau. (Subparagraphs (a) and (b) merely set out the conditions where the chapeau applies.)

In addition, after the words "any agreed procedure", in the tailpiece to paragraph (3), there should be inserted *"for ascertaining"*. At present, the connection with the words that follow is missing.

To make this sentence less cumbersome, it could perhaps be redrafted as follows:

"However, this paragraph does not apply if the addressee knew that the data message was not that of the originator, or should have known that it was not, by the exercise of reasonable care or the use of any agreed procedure for ascertaining whether it was."

Paragraph (4): As a minimum, certain amendments would be needed to attempt to make sense of the second sentence. However, the UK strongly believes that logic requires the second sentence to be deleted, because it was conceived on the basis that the presumption in the first sentence was to be irrebuttable, and this is no longer the case.

The presumption in the first sentence is rebuttable. As drafted, however, the second sentence applies where there has, as a matter of fact, been an error in the content. This conjunction of a rebuttable presumption with the premise that there has been an error is contradictory, because where there has, as a matter of fact, been an error in the content, the presumption in the first sentence will inevitably be rebutted in any event, and the second sentence will therefore be superfluous.

In addition, the second sentence is actually incorrect in applying the presumption by implication, where there has as a matter of fact been an error of which the addressee was unaware (and where the addressee was not negligent). There cannot be a rebuttable presumption that the content was correct where the known fact is that there was an error.

If the second sentence is to be retained, therefore, it needs to be revised along the following lines. (The suggested alterations are underlined.)

"However, where the originator alleges that the transmission has resulted in an error in the content of a data message... the content of the data message is not presumed to be that received by the addressee insofar as the data message is alleged to have been erroneous, ..."

This would make it clear that the presumption only applies in case of uncertainty as to whether the originator is correct in alleging an error.

In addition, the drafting does not work at present in the case of an erroneous duplication of a data message. In such a case, the addressee believes that there were two data messages. It does not therefore make sense to say that the content of the data message (singular) is not presumed to be that received by the addressee. To meet this point, the wording would need to be revised as follows:

"... the content of the data message or messages received by the addressee is not presumed to be that transmitted by the originator insofar as the data message or messages are alleged to have been erroneous, ..."

However, if it can be shown that an addressee knew of an alleged error, or that an alleged error would have been apparent if the addressee had exercised reasonable care, it will generally be possible, and indeed easier, to show that the alleged error actually existed. It is therefore superfluous to provide a rebuttable presumption that the error existed in those circumstances.

The second sentence of paragraph (4) should therefore be deleted altogether.

In the UK's view, this defect in the current draft has arisen in the following way. The second

sentence of paragraph (4) was drafted on the assumption that the presumption in the first sentence was to be irrebuttable ("deemed"). On that basis, the second sentence makes sense. The UK agreed with the policy decision to make the first sentence a rebuttable presumption; but now this has been done, the logical consequence of making the presumption rebuttable is that the second sentence should be deleted.

Article 12(5)

The first sentence of paragraph (5) covers two situations. The first is where there is a dispute about whether it was the addressee or another person who sent the acknowledgement of receipt. The second is where it is agreed that the addressee sent the acknowledgement of receipt, but there is nevertheless a dispute about whether the addressee received the originator's message.

The first situation is already covered by article 11, and should not be covered here. Moreover, the position under this provision is inconsistent with article 11(2) and (3), because under this provision the mere receipt of the acknowledgement is in effect sufficient to give rise to a presumption that the acknowledgement was sent by the addressee.

The first sentence of paragraph (5) should therefore be confined to the case where it is accepted that the acknowledgement was sent by the addressee, but it is disputed that the addressee received the originator's data message. The situation where there is a dispute as to whether the acknowledgement originated from the addressee will then be covered by article 11.

To achieve this result, the following words should be inserted after "Where the originator receives an acknowledgement or receipt":

"transmitted by or on behalf of the addressee".

Article 13

The UK considers that a similar point arises here as on article 4. In the UK's view, the end of the second sentence of paragraph (1) should be amended, by replacing the words "on the sole ground that a data message was used for that purpose" by the following:

"on the grounds that a data message was used for that purpose, provided that no particular requirement applies which the use of a data message for that purpose does not satisfy."

The UK understands that the intention of this sentence is not to affect requirements that a contract, or a particular kind of contract, must be in writing.

As drafted, however, the second sentence appears to prevent a statutory requirement that a contract, or a particular kind of contract, must be in writing from having the effect of invalidating a contract concluded by means of data messages, in a case where the contractual agreement of the parties, or the terms to which they agree, are never expressed in writing.

If it is possible to say that, because the contract was only ever expressed in data messages, the requirement for writing has not been satisfied, then it would seem to be the case that the sole ground for denying the validity or enforceability of the contract is that data messages were used for this purpose. Article 13(1) would therefore render the statutory requirement ineffective. Since we understand that this is not the intention of the Working Group in drafting the second sentence, a clarification is needed as suggested above.

The reference to "the sole ground" is likely to lead to difficult semantic argument as to whether a contract is being denied validity or enforceability on the sole ground that a data message was used, in a case where the objection is made that the contract was concluded by means of data messages, and therefore was not in writing as required. The word "sole" should therefore be deleted, and instead (as stated above) there should be added, at the end of the sentence, a new proviso that no particular requirement applies which the use of a data message for this purpose does not satisfy.

Article 14(4)

Insofar as it relates to the deemed place of despatch, this rule may be unnecessarily restrictive. If the originator specifies in the data message the place from which it was actually despatched, this should not be overridden by a rule which artificially deems the message to have been despatched from somewhere else.

The UK therefore considers that, in the first sentence, the words "at the place where the originator has its place of business" should be amended to read:

"at the place specified by the originator in the data message, or, in the absence of such specification, at the place where the originator has its place of business".

B. Intergovernmental international organizations

ASIAN DEVELOPMENT BANK

[Original: English]

The Bank's Legal Office has reviewed the draft text of the Model Law and we have no comments to make on the document.

EUROPEAN UNION

[Original: English]

Article 1. Sphere of application

In the first footnote to chapter I it is mentioned that "this Law does not override any rule of law intended for the protection of consumers". In paragraph 78 of the Deliberations of the Working Group it is stated that the Working Group found the substance of the footnote to be generally acceptable.

The European Commission considers that the term "consumers" is perhaps too narrow. We presume that this Model Law, even though it may (also) be applicable to natural persons, does not purport to

override any fundamental freedoms and rights of natural persons as recognized in international treaties, constitutions and other laws. Explicit reference is made to article F (2) of the Treaty on European Union, which reads:

> "2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of human rights and fundamental freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of community law".

As a pertinent example of the application of these rights within the European Community, reference is made to the proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Com (92) 422 final - SYN 287. It is expected that a common position will be reached by the Council of Ministers on 20 February 1995 with a view to the adoption of this proposal.

In light of the foregoing, the European Commission proposes to change the above-mentioned footnote as follows:

> "This law does not override any rule of law intended for the protection of fundamental rights and freedoms of individuals or for the protection of consumers".

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

[Original: English]

FAO has no comments to make.

INTERNATIONAL LABOUR OFFICE (ILO)

[Original: English]

The Model Law would seem to fall largely outside the area of the ILO's mandate, and our comments are thus restricted to the possible impact it might have in the labour field.

The sphere of application specifies that the Model Law "forms part of commercial law." The definition of commercial law in the footnote states that it should be given a wide interpretation. Although it does not appear that the Model Law is intended to govern contracts of employment or other relationships between employers and employees, this is not explicitly excluded. To avoid such an impression, it might be better to explicitly exclude such contracts and relationships.

Alternatively, consideration might be given adding a reference to workers in the first footnote, which would then read, "This Law does not override any rule of law intended for the protection of consumers or workers."

Should this understanding, i.e. that the Model Law is not to apply to the employer/employee relationship, be incorrect, the Office would be quite willing to provide additional comments on the text. These would relate in particular to concerns regarding the confidentiality of data retained, in the interest of workers' privacy.

INTERNATIONAL MARITIME ORGANIZATION (IMO)

[Original: English]

It appears that the draft legislation would not be of immediate relevance to the activities of IMO. However, it may become applicable in respect to the International Ship Information Database (ISID) currently being developed. While it is unclear to what extent the model legislation would be applicable, insofar as the objectives and structure (including users, providers and access) of the ISID are still being formulated, the following observations concerning matters of general relevance to ISID are offered for consideration. These comments relate to specific articles of the draft model law set forth in document A/CN.9/406, 17 November 1994, at Annex.

(1) **Article 6. Signature**

In respect to the method used to identify the originator of the data message, article 6(b) provides that: "... that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, ...". This provision could be seen to be insufficiently clear as to the standard of reliability applicable to the method used to identify the originator. Perhaps consideration could be given to identifying with greater specificity the applicable criteria relating to the term "reliable" and the intended standard of reliability.

(2) **Article 7. Original**

Article 7(2)(b) makes reference to "the standard of reliability required" regarding originals. The standard can be seen to be insufficiently clear, and perhaps consideration could be given to providing objective criteria for the applicable standard of reliability, or appropriate clarification in a guide to enactment.

It may perhaps be useful to clarify what this standard of reliability applies to; that is, whether it applies to the "reliable assurance as to the integrity of the information" under article 7(1)(b), or, for example, to the manner in which the data record was generated, stored, communicated or authenticated.

(3) **Article 8. Admissibility and evidential value of data messages**

Article 8(2) refers to reliability in relation to data messages and to the integrity of information. The standard of reliability to be applied is unclear and perhaps consideration could be given to establishing objective criteria for the applicable standard of reliability, or appropriate clarification in a guide to enactment.

(4) **Article 11. Attribution of data messages**

The final paragraph of article 11(3) provides: "However, subparagraphs (a) and (b) do not apply if the addressee knew, or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator."

One matter which could cause some concern is whether this provision should include the situation where the addressee "should have known, had it exercised reasonable care", inasmuch as this would appear to impose a subjective standard of insufficient clarity as to the burden placed on the addressee, where consequences of liability for damages could be involved. Perhaps this matter could be taken into consideration in the preparation of the analytic commentary.

ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

[Original: English]

While having no specific suggestions to make for amendment, the OECD wishes to recommend to the attention of UNCITRAL the following Guidelines, which have been adopted and implemented by 25 OECD Member countries as well as by hundreds of private enterprises:

- 1992 OECD Guidelines for the Security of Information Systems, in particular the definitions of "data", "information" and "information systems", the nine principles of the Guidelines, and the provisions for implementation; and

- 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC)

[Original: English]

ECLAC has no comments to make.

C. Non-governmental organizations

BANKING FEDERATION OF THE EUROPEAN UNION

[Original: English/French]

I. GENERAL OBSERVATIONS

The Banking Federation believes that the draft model law should be reviewed in regard to the use of concepts. The method used - which is to seek the functional equivalents, in terms of electronic data interchange, for writing (article 5), for a signature (article 6) and for the original (article 7), does not seem to us to be the best. Data processing and EDI clearly give rise to entirely new legal problems which appear inappropriate to resolve by traditional means.

We furthermore think that the French version of this document calls for criticism due to lack of clarity in the wording.

II. OBSERVATIONS ON THE ARTICLES OF THE DRAFT MODEL LAW

1. Chapter I - General provisions

Article 1: Sphere of application

The purpose of including the statement that the law only relates to commercial law could be questioned, given that the text is produced by UNCITRAL - United Nations Commission on International Trade Law.

Article 3: Interpretation

Article 3(2) refers to the general principles on which the law is based. This reference is too imprecise and risks giving rise to differences in interpretation and even conflict.

2. Chapter II - Application of legal requirements to data messages

Article 4: Legal recognition of data messages

This article prohibits the denial of any legal effectiveness, validity or enforceability to a "data message".

This provision seems much too vague to be acceptable in its current form.

Articles 5 and 6: Writing - Signature

These provisions (which give the "data message", with respect apparently to the validity of agreements, equal force to writing accompanied by a hand-written signature) remove any specific value from writing when the latter is required "ad solemnitatem". It must be asked whether problems of enforceability vis-à-vis third parties could not arise.

Reference should be made in article 5(1) to the requirement for the information to be sound. A question also arises as to whether "subsequent reference" would be on a unilateral or bilateral basis.

In addition, since article 6 is included in Chapter II, this provision cannot be varied by agreement. The possibility provided for under article 10 only applies to the provisions of Chapter III. It should be ensured that the obligations of a technical nature established by this article do not create excessively burdensome constraints.

With regard to article 6(1)(b), who decides whether this method is reliable? In addition, this provision could lead to fears that, despite the existence of an agreement between the originator and the addressee establishing a particular identification procedure, the signature on the data message could be called into question on the basis that the identification process was not reliable.

Articles 7 and 8: Original - Admissibility and evidential value of data messages

These provisions confer on "data messages" an evidential value equivalent to writing, leaving it to the courts to assess the weight of the evidential value.

What is meant by "reliable assurance" in article 7(1)(b)?

In article 7(2)(a) mention is made to "whether the information has remained complete and unaltered". Who will determine whether and how this is the case?

Article 8(1) (whereby "nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence") and article 8(1)(b) (which provides for the application of any other rule of law "if it is the best evidence that the persons adducing it could reasonably be expected to obtain") would seem to be contradictory.

Article 9: Retention of data messages

These provisions warrant greater detail, in particular as regards proof that the data transmitted and received are identical and that they can be reproduced in legible form.

Since it is impossible to alter the provisions of this article by agreement, it should be ensured that this article does not impose excessive constraints.

We also feel that the phrase "where it is required by law" in the first sentence of the article is ambiguous. In general, it may be presumed that the retaining of data messages is always required by law. Proof must be retained of the performance or transmission of an order. But if this is the meaning to be given to this phrase, the provisions of this article would impose disproportionate constraints. It would be more realistic to limit the scope of this article to cases where the law requires specific retaining of documents for reasons of general interest.

Article 9(1)(c) is difficult to understand in its current wording. It should at least be altered as follows "... including, but not limited to, *information associated with* the originator, addressee(s), and date and time ..."

3. Chapter III - Communication of data messages

Article 10: Variation by agreement

This article enables the parties to derogate by agreement from the provisions of this chapter, except as otherwise provided.

The question is whether it can rightly be concluded, in contrast, that the provisions of the other chapters are binding.

Article 11: Attribution of data messages

Article 11(2) contains a contradiction in that it states that the data message can be presumed to be that of the originator if the addressee has *ascertained* that the message emanated from the originator.

The solutions provided in article 11(3)(a), (b) and the last paragraph (which either make it possible to attribute to the originator a data message which cannot be presumed, under articles 11(1) and (2), to emanate from him, or on the contrary exclude this possibility) make reference to imprecise data (see in particular "... whose relationship with the originator ..."), which appear to make them difficult to apply.

How can it be determined whether "reasonable care" - provided for under article 11(3), last paragraph, and article 11(4) - has been exercised?

Article 11(5), whereby any legal effect of presuming that a message emanated from the originator "will be determined by this Law and other applicable law", would seem to conflict with article 10.

Article 12: Acknowledgement of receipt

The meaning of and justification for article 12(4)(b) are not easy to see. Indeed, if an acknowledgement of receipt is not a prerequisite for performance of the instructions contained in the data message, how can it be presumed (in the event that an acknowledgement of receipt is not received within a given deadline) that the data message had never been transmitted (since it might have been received and been performed)?

What is meant moreover by the phrase "exercise any other rights it may have"?

Article 13: Formation and validity of contracts

The provisions of Chapter III apply directly to data messages received outside the contractual framework. This would be the case, for example, with an order received by fax, electronically or otherwise. Under the provisions of Chapter II, such an order could not per se be systematically deemed to have been invalidly issued. It is essential that the addressees, and in particular banking institutions, retain the possibility of refusing to execute orders which are only presumed to have come from the originator.

It would therefore be appropriate for the model law to establish the principle whereby the addressee can always demand confirmation in another form of the data message and article 13(1) should be reworded as follows: "In the context of contract formation, unless otherwise agreed by the parties or a contrary view is expressed by one of the parties, ...".

Finally, can the originator not withdraw the offer before it is received or known to the addressee?

Article 14: Time and place of dispatch and receipt of messages

The references to "unless otherwise agreed" in article 14(1), (2) and (4) serve no purpose since article 10 is included in Chapter III (see article 10).

With regard to article 14(2)(a), what are the procedures or possibilities of control at the disposal of the originator to check that the data message has genuinely been received?

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DRAFT MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

Compilation of comments by Governments and international organizations

Addendum

CONTENTS

Page

States

Japan 2
Mexico 5
Namibia 8

B. Intergovernmental international organizations

Bank for International Settlements (BIS) 8

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A. States

JAPAN

[Original: English]

Japan considers that the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, approved by the UNCITRAL Working Group on EDI in its 28th session, is of great importance, since it constitutes a solution at the international level to the difficult problem of removing legal obstacles to the use of EDI in commercial transactions. In general, this draft Model Law is formulated in a flexible manner, as it should be, given the diversity in national legal systems and the principle of party autonomy. It is expected that this Model Law, when adopted, will serve as a useful point of reference for any country intending to amend its national laws to meet the needs of an age of electronic commerce. Nevertheless, it is our view that in its present form, the draft Model Law contains provisions which leave room for improvement. The following comments are offered without prejudice to our final position on the draft Model Law.

Article 2

According to the paragraph (a) definition of "data message", a key notion of this Model Law, information becomes a data message when it is generated, stored or communicated by any of the means covered by that paragraph. The notion of a data message in this Model Law is there defined in such a way as to mean the information thus processed through electronic means. On the other hand, the expression "information in a data message" used in paragraph (f) suggests that the term "data message" might mean a container of information, as it were, something distinct and separate from the information itself. It will, therefore, be desirable for the guide to the Model Law to give a comprehensive explanation of the notion of "data message" as used in the Model Law.

Article 7

Although there is some doubt as to whether the requirement of sub-paragraph (a) of paragraph (1) should be an essential element of the notion of "original", if the purpose of this sub-paragraph is to make it clear that the display of information through an electronic device may substitute for the presentation of information in paper documents required by law, then it would be more appropriate to use the same terminology as in Article 5 Writing, where, in addressing the question of presentation of information in an EDI environment, the expression "accessible" is used instead of "display".

With regard to sub-paragraph (b) of paragraph (1) of Article 7, we fear that the words "it was first composed in its final form" might create problems with regard to application. In an EDI environment, the same information could be recorded in different forms at one time, as well as at different times. In such an environment, what does "its final form" mean? How should, or could, the question of when the information was first composed in its final form be decided? The guide to the Model Law should address the point by illustrating how this sub-paragraph would operate in practice.

Article 8

As a matter of principle, the question of weight of evidence should be left to the trier of fact. Any provisions of this Model Law in this area should be limited to stipulating factors or guidelines to be taken

into account in evaluating the evidential value of a data message so as to avoid the risk of interfering with the free discretion of judges (see para. 102 of A/CN.9/373). From this point of view, the first sentence of paragraph (2) of Article 8 is unnecessary, as it is self-evident that any information, in whatever form, should be given due evidential weight, once admitted as evidence. To delete this sentence and retain only the second sentence will suffice for the purpose of this paragraph.

The reference to Article 8, in paragraph (3), should be to Article 7. In any case, however, paragraph (3) should be deleted, as the purport of this paragraph is already sufficiently covered by Article 7 and the second sentence of paragraph (2) of Article 8.

Article 9

If sub-paragraph (c) of paragraph (1) is to require the retention of transmittal information in an EDI environment even where the retention of such information is not required by the relevant provisions of national law in a paper-based environment, this sub-paragraph might be too restrictive, as it imposes a more stringent requirement regarding the retention of information in the form of data messages than in the form of paper documents. The guide to the Model Law should explicitly state that this Article is not intended to burden information in the form of a data message with requirements beyond what is required by national law in respect to the retention of transmittal information.

Article 11

As a matter of drafting, the word "deemed" used in paragraph (1) is considered to be inappropriate. That a message communicated by the originator or by any authorized person is that of the originator goes without saying. There is no need to "deem" such a message to be that of the originator by operation of law. The words "deemed to be" should be deleted and, consequently, the entire paragraph (1) might be said to be unnecessary.

With respect to paragraph (3) of Article 11, if the opening words "Where paragraph (1) and (2) do not apply" are to be retained, the logical conclusion would be to choose the word "deemed" in brackets in the chapeau, because, if these opening words are retained, the prerequisite for the application of paragraph (3) might be considered as that it has been established that paragraph (1) is not applicable, namely that a data message was neither communicated by the originator himself nor by a person authorized by him. Obviously, this prerequisite serves as counter-proof to rebut the presumption that the data message is that of the originator. Hence, choosing the word "presumed" in the chapeau, while at the same time retaining the opening words, would be self-contradictory.

On the other hand, however, if paragraph (3) is made a "deem" provision, a policy problem will arise, as an addressee who properly applies a procedure agreed to by the originator is, as the draft now stands, protected only by a presumption under paragraph (2). It does not seem reasonable to give greater protection to an addressee who does not apply such a procedure.

We are of the view that in order to maintain a proper balance between paragraphs (2) and (3), paragraph (3) should be a presumption provision, which would then protect the addressee who, for one reason or another, did not, or was not able to, apply an agreed procedure properly, but nevertheless deserves the protection of the presumption. Assuming that the substance of the present sub-paragraphs (a) and (b) of paragraph (3) is to be maintained as requirements for such protection, which might be questionable if paragraph (3) is to provide for a presumption, the following new paragraph (3) is suggested with a view to clarifying the subject matter of the presumption.

New paragraph (3)

"Without prejudice to paragraphs (1) and (2),

(a) a person whose actions resulted in the data message as received by the addressee is presumed to have the authority to act on behalf of the originator in respect of that data message if the relationship of that person with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify the data message as its own; or

(b) a data message is presumed to be that of the originator if the addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However --------[unchanged]----------"

In this connection, the guide to the Model Law should provide explanation as to the character and scope of the "relationship" in sub-paragraph (a) of paragraph (3). For instance, should a person entrusted with the task of developing the originator's information system, and thus knowing the method for identification, be regarded as falling within the scope of this sub-paragraph? Moreover, in view of the similarity of and possible conflict between Article 11 of this Model Law and Article 5 of the UNCITRAL Model Law on International Credit Transfers, the guide to the Model Law should clarify how these two Model Laws interrelate with each other in application.

As regards paragraph (4), by virtue of the presumption provided in the first sentence of that paragraph, the burden of proof for establishing that the data message as received by the addressee contains an error is on the person claiming the existence of such an error. In our view, establishing that transmission resulted in an error in the content of a data message or in the erroneous duplication of a data message should be sufficient to rebut the presumption, whether or not it is established that the addressee knew or should have known of the error, thus, being irrelevant. Accordingly, the words "if the addressee knew ------ in transmission" in the second sentence of this paragraph should be deleted.

On the other hand, we note that there are cases where there is an agreement between the originator and the addressee as to a method for ascertaining the integrity of a data message apart from an agreement as to a method to identify the origin of a data message as envisaged in paragraph (2). It could be argued that an addressee who ascertained the integrity of a data message in accordance with such an agreement deserves more protection than that of a mere presumption provision. If this argument is accepted, there would be a need for a provision, either in the form of a redrafted paragraph (4) or a new paragraph, to the effect that the content of a data message is deemed to be that received by the addressee, if the addressee ascertained the integrity of the data message by properly applying a procedure previously agreed to by the originator, unless the addressee knew or should have known, had it exercised reasonable care, that the data message contained an error.

Paragraph (5) is unnecessary, as it states the obvious.

Article 12

The present formulation of paragraph (3) gives the addressee the option of sending the acknowledgement at any time it considers it advantageous to give effect to the originator's message, where the originator has not specified the time within which the acknowledgement must be received. In order to avoid the addressee's being permitted to speculate at the risk of the originator, the words "until the acknowledgement is received" should be replaced by the words "unless the acknowledgement is received

within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time".

Furthermore, since it is our understanding that the question of whether or not a data message conditional upon receipt of the acknowledgement has any legal effect should be governed by applicable law, the expression "the data message has no legal effect" in this paragraph is inappropriate. The same wording as used in sub-paragraph (b) of paragraph (4), that is, "the originator may treat the data message as though it had never been transmitted, or exercise any other rights it may have", is preferable.

Paragraph (4) contemplates a situation where the originator, while specifying the time within which the acknowledgement must be received, does not state that the data message is conditional on receipt of the acknowledgement. It is difficult, however, to imagine that such a situation will occur in practice, since it may reasonably be assumed that a data message is conditional on receipt of the acknowledgement, when a time for receipt is specified, or agreed to. The words "within the time specified or agreed or ---- specified or agreed" should, therefore, be deleted.

MEXICO

[Original: Spanish]

With reference to the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, the following are proposed comments by the Government of Mexico:

1. The Mexican Government welcomes the completion by the Working Group of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, and trusts that this Working Group, at its next session, will complete the guide for the enactment of the Model Law, so that both documents can be considered at the next plenary session of the United Nations Commission on International Trade Law.

The significance of the use of electronic communication media is increasing daily, in both domestic and international commerce. An important effect of the use of these electronic media in the communication and archiving of trade information will be the multiplication of trade exchanges and the reduction of their cost.

In spite of the fact that the use of electronic media is such a daily practice, already forming part of the culture of the business world, it lacks specific legal regulation, since there are practically no laws in force, judicial precedents or legal traditions recognizing its value and legal consequences; as a result, there is a major legal vacuum.

The discrepancy between commercial practice and legal regulation is a cause of uncertainty and an obstacle to international trade. This obstacle, to the extent possible, should be removed through the drafting of legal rules aimed at providing juridical solutions which will remove the doubts and uncertainties of commercial operators.

It is highly probable that, in the future, practice and jurisprudence will lead to an evolution in the provisions offered by the draft. Electronic commerce is a very recent phenomenon, and a legal culture, derived from experience, is still lacking; only long practice can generate such a culture. In spite of this, the set of provisions in the draft Model Law will serve as a starting-point for the evolution in question and,

what is more important, will help to guide legislators in drafting a minimum of legal provisions to regulate the phenomenon.

The Mexican Government considers that the draft, as offered by the Working Group, is a satisfactory result and can be adopted by the Commission at its next session. Nevertheless, we think that it would be useful to suggest some points for discussion with the aim of improving the final drafting.

2. The title of the Model Law should be changed to "Model Law on Legal Aspects of Electronic Commerce".

This suggestion was made almost at the end of the last session of the Working Group and, given its novelty, did not obtain the necessary support to be adopted (see document A/CN.9/406, paras. 75-77).

We consider the arguments in favour of changing the title to be valid, since the use of the term EDI is, at least, confusing; this term covers only one of the means of communication regulated. On the other hand, the reference to "related means of communication" is vague and says little to anyone who is not fully familiar with the content of the Model Law. In other words, the title may lead to confusion and, as was said in the Working Group, it is "not very commercial".

The expression "electronic commerce", on the other hand, is becoming increasingly widespread and accepted in practice. Reference in the title to "electronic commerce" will give anyone who did not participate in the preparatory work a quicker and more exact indication of the content and importance of the Model Law.

Moreover, the fact that the sphere of application is clearly delimited, as can be seen from article 1 and subparagraphs (a) and (b) of article 2, will avoid any doubt regarding the sphere of application of the Law and the absence of a definition in it of the concept of "electronic commerce". The title does not describe the scope of application and is no more than a summary indication of the content of the document.

3. The definition of the term "intermediary" can and should be deleted, with any necessary explanations given in the guide to enactment. The definition is unnecessary. What is more, it suggests, at first reading, that the Model Law is concerned with intermediaries, which is not the case. The Working Group decided to deal with the relationship between the originator and the addressee and not the relationship between these parties and any intermediary.

At the end of the deliberations, the definitions were reviewed and it was noted that the term "intermediary" was used only in two of the definitions and not in any other article. The definitions in question are those of "originator" and "addressee" in subparagraphs (c) and (d) of article 2, where the expression "any third person" can easily be used. If thought necessary, the relevant explanations would be provided in the guide to enactment (see A/CN.9/406, paras. 146-148).

4. Consideration should be given to the deletion of article 7 concerning the "original". Unless negotiable documents are referred to, there is no case in fact in commerce, and particularly in international commerce, of a rule of law requiring information to be presented in its original form. The Model Law is not concerned with "negotiable documents"; negotiability will be discussed as part of the Group's planned future work.

When the requirement for an original arises from an agreement between the parties, it will be for the parties, in their agreement, to specify the cases in which a communication by electronic means will satisfy the required conditions.

If any customary procedure requires the presentation of originals, the procedure itself will gradually

change in a natural way, to adapt to the practices of the type of trade in question or of the region where the procedure is followed.

Thus, the usefulness of article 7 is limited. Its text, on the other hand, is ambiguous and subject to various interpretations in the case of expressions like "the standard of liability required ... in the light of the purpose for which the information was composed and in the light of all the relevant circumstances" and "the criteria for assessing integrity shall be whether the information has remained complete and unaltered". There are also conditions that are difficult to fulfil such as that "there exists a reliable assurance as to the integrity of the information ...".

It would be preferable to delete this article and instead to state that:

"This Law does not deal with negotiable documents [or with cases in which a rule of law requires information to be presented in its original form]".

5. Article 10, concerning variation by agreement, which is to be found in chapter III on communication of data messages, should be moved back to where it was during the first stages of the draft, since it is applicable to the whole law and not only to the case of communication of messages.

The article was moved in order not to allow parties, in the use of contractual freedom, to derogate from mandatory rules, and it was agreed to restrict such contractual freedom to communications between the parties. These arguments are erroneous and lead to results that are not intended and that are more restrictive, even, than when parties carry out their operations, or record them, through media documented on paper.

In any case, one must distinguish between the legal relationship between the parties and the effects of their acts on third parties. In the case of private relationships, of a commercial nature, between subjects of private law, the restriction of contractual freedom, with a few exceptions, is an obstacle to trade that should be removed.

For example, nothing should prevent the parties from agreeing otherwise than is laid down in article 8 regarding the admissibility and evidential value of data messages, when it is a question of settling a dispute between these parties through arbitration or even in the courts of the State. The same is true regarding what is laid down with reference to the retention of data messages as covered by article 9, as long as the agreement between the parties affects only the relationship between these parties themselves.

It will be different if the agreement is intended to be capable of causing effects in respect of the rights and obligations of third parties outside the relationship. Should it be thought necessary to clarify this point if the article is put back in chapter I, containing general provisions, the following paragraph could be added:

"The agreement between the parties shall not affect the rights and obligations of third parties."

6. It would be useful for article 13 to be expanded to cover not only cases of contract formation but all cases of manifestation of will, since there is no reason to limit the declaration of validity to the offer or acceptance of a contract. Consequently, it is suggested that paragraph (1) of article 13 should say:

"(1) Unless otherwise agreed by the parties, *any manifestation of will expressed by means of a data message shall have legal force*. A contract *or any other juridical act* shall not be denied validity or enforceability on the sole ground that a data message was used in bringing it about, where this is the case."

NAMIBIA

[Original: English]

We are generally in agreement with the suggested changes and analytic comments from the UNCITRAL Working Group on the Model Law on Legal Aspects of Electronic Data Interchange, and advise that we have no specific comments to make at this stage.

B. Intergovernmental international organizations

BANK FOR INTERNATIONAL SETTLEMENTS (BIS)

[Original: English]

We appreciate the efforts undertaken by UNCITRAL to harmonise certain legal aspects arising in connection with Electronic Data Interchange. At present, however, the Bank is not directly involved in the computerised exchange of standardised trade data, apart from S.W.I.F.T. messages. Due to the particular nature of the Bank as bank for central banks, we also do not have direct relationships to "trading partners" that make use of EDI.

Therefore, despite being very interested in the legal issues of EDI and closely following the respective developments, we are unable at this stage to provide specific comments on the draft Model Law.